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IN THE

Supreme Court of the United States

OCTOBER TERM, 1934.

No. 574.

CHARLES M. DOLEMAN, Administrator of the Estate of Robert R. Doleman, *Petitioner*,

vs.

HARRY LEVINE, *Respondent*.

BRIEF FOR RESPONDENT.

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HARRY LEVINE, *Respondent*.

BRIEF FOR RESPONDENT.

This is a review upon a writ of certiorari to the United States Court of Appeals for the District of Columbia.

The case involves the construction of the Longshoremen's and Harbor Workers Compensation Act, approved March 4, 1927 (U. S. C., Title 33, Chapter 18), as made applicable to employment in the District of Columbia by Act of Congress approved May 17, 1928 (D. C. Code, Title 19, Chapter 2), which will hereinafter be referred to as the "Compensation Act"; and the Act of Congress of February 17, 1885 (23 Stat. at L. 307, Chapter 126; D. C. Code 1924, Sections 1301-1303; D. C. Code 1929, Title 21), which is a statute providing for liability for negligence causing death, and

which will hereinafter be referred to as the "Death by Wrongful Act Statute".

STATEMENT OF FACTS.

On January 3, 1933, one Robert R. Doleman, an employee of the Potomac Electric Power Company, while working in a manhole in the street at Lincoln Road and R Street, Northeast, in the District of Columbia, was struck by an automobile owned by Harry Levine and operated by one Harry Barner, sustaining injuries from which he died on the same day. Robert R. Doleman left surviving him his widow, Mary E. Doleman, his father, Charles M. Doleman, and a brother, as his heirs at law and next of kin.

The widow elected to receive compensation from Robert R. Doleman's employer, the Potomac Electric Power Company, under the Compensation Act. After she filed her claim for compensation, an award was made in her favor by the Deputy Commissioner, and she has been and is now receiving compensation from the Potomac Electric Power Company.

The father obtained letters of administration on the estate of Robert R. Doleman in the Supreme Court of the District of Columbia. Then the father, who alleges to have been partially dependent upon Robert R. Doleman, filed an election under the Compensation Act to proceed against the third party (Harry Levine) alleged to be responsible for the death of Robert R. Doleman.

On November 1, 1933, Charles M. Doleman, as the administrator of the Estate of Robert R. Doleman (hereinafter referred to as the "administrator"), filed a suit in the Supreme Court of the District of Columbia against Harry Levine. The declaration proceeded to state a cause of action under the death by wrongful act statute, and alleged that the defendant, acting by and through an agent, servant and employee, negligently caused the death of Robert R. Doleman; and the plaintiff claimed damages in the amount of Ten Thousand ($10,000) Dollars therefor.

Thereafter, on November 13, 1933, the Potomac Electric Power Company (hereinafter referred to as the "employer") filed a suit in the Supreme Court of the District of Columbia against Harry Levine. The declaration proceeded to state a cause of action under the death by wrongful act statute, assigned to the employer by the provisions of the Compensation Act, and alleged that the defendant, acting by and through an agent, servant and employee, negligently caused the death of Robert R. Doleman; and the plaintiff claimed damages in the sum of Ten Thousand ($10,000) Dollars therefor.

The defendant Harry Levine filed in each case a plea in abatement, setting forth in each plea the pendency of the other action, and in the administrator's action alleging that the cause of action was assigned by the terms of the Compensation Act to the employer, and in the employer's action alleging that by the terms of the death by wrongful act statute such an action should be brought by the administrator. The administrator and the employer, in their respective suits, each filed a demurrer to the plea in abatement. The cases came on for hearing together upon the respective demurrers and were argued and submitted to the Court. The Court sustained the demurrer to the plea in abatement in the employer's action; and overruled the demurrer to the plea in abatement in the administrator's action. Opinions of the Court were published in 62 W. L. R. 77, 78.

The administrator, after obtaining leave of Court, filed an amended declaration, in which he added an allegation that Charles M. Doleman was a dependent of the deceased; and counsel stipulated that the plea in abatement, the demurrer to the plea in abatement, and the ruling of the Court on the demurrer to the plea in abatement should stand with the same force and effect to the amended declaration as they did to the original declaration. Then the administrator elected to stand upon his demurrer to the plea in abatement; and a judgment was entered abating the action.

From this judgment the administrator noted and perfected an appeal to the United States Court of Appeals for the District of Columbia.

The case was duly presented to the United States Court of Appeals for the District of Columbia, and that Court rendered a decision affirming the judgment of the Supreme Court of the District of Columbia.

The administrator petitioned this Court for a writ of certiorari; and this Court granted certiorari.

QUESTIONS INVOLVED.

The errors alleged to have been committed by the Supreme Court of the District of Columbia in abating the administrator's suit were assigned by the petitioner and appear in the record. The primary question, of course, is whether or not the administrator, under the facts of this case, has the right to maintain the action against the respondent for the alleged negligence causing the death of Robert Doleman.

It would seem, in view of the provisions of the Compensation Act, that this question depends in the main upon whether or not there has been a valid election to accept compensation, which would operate as an assignment of the cause of action to the employer.

This Court has already ruled, in the case of *Aetna Life Insurance Company* vs. *Moses*, hereinafter referred to, that the employer is a proper party to maintain an action for negligence causing death. In this case the only difference is that there is more than one heir at law and next of kin, and the father claims to be also a dependent of the deceased; whereas in the Moses case the widow was both the personal representative and the only person entitled to compensation, according to the record. The United States Court of Appeals in this case has ruled, in effect, that where *any* dependent elects to and does receive compensation under the Compensation Act, there is an assignment of the

entire cause of action under the death by wrongful act statute to the employer.

The petitioner is seeking, upon this review, a reversal of the decision of the United States Court of Appeals for the District of Columbia, and a ruling that the administrator is the proper party to maintain the action in question.

The petitioner also urges certain discriminations and inequities which, he contends, will result from the decision of the lower Court. The respondent feels that such discriminations and inequities, if any there be, are merely collateral and do not control the real question involved, namely that of statutory construction.

ARGUMENT.

At the outset of the argument the respondent desires to state that he has been named as defendant and served with process in two separate suits, each of which claims damages from him for the same alleged negligent act resulting in the death of Robert Doleman. Primarily, the respondent's position is that the right of action for negligence causing death is a single action, which cannot be split; and, before being put to his defense on the allegations of negligence, he is entitled to a decision finally determining which of the two suits that have been filed he must answer and defend. Having been served with process in both suits, and being required to appear and answer each case, and having no preference as between the two suits filed, the respondent filed a plea in abatement in each suit, asserting in each plea that the other suit was properly brought and that the suit in which the plea was filed should abate.

The argument hereinafter will therefore be divided into two subdivisions, in the first of which the respondent will support his primary position that he should be required to defend only one action, and in the second will support his plea in abatement in this case that the suit by the employer was the only proper and valid suit which could be maintained under the facts of this case.

There is Only One Right of Action for Negligence Causing Death in the District of Columbia.

The right to maintain an action and to recover damages for negligence causing death is solely statutory, and did not exist at common law. In the District of Columbia, such a right is expressly created by the death by wrongful act statute, which provides that "the person who or corporation which would have been liable if death had not ensued shall be liable to an action for damages for such death".

This is the only right of action for negligence causing injury to the person, which survives after the death of the injured person. Apart from the fact that such a right must be created by statute, it is expressly provided by Section 31 of Title 24 of the D. C. Code 1929 (Act of March 3, 1901; 31 Stat. 1227, c. 854, sec. 235) that no right of action for an injury to the person, except as provided in Title 21 of the Code, shall survive the death of such person.

The Compensation Act, similar in nature and purpose to the compensation laws in the various states, was designed to regulate the rights and liabilities between employer and employee. A burden is thereby placed upon an employer to secure compensation for an injury or death resulting from an accident without regard to fault or negligence on the employer's part. It is in effect a charge upon the industry or business in which the employer and the employees in any case are engaged; and upon that theory has been held to be constitutional. See:

New York Central R. R. Co. vs. *White*, 243 U. S. 188; 61 L. Ed. 667.

Ward & Gow vs. *Krinsky*, 259 U. S. 503; 66 L. Ed. 1033.

Arizona Employer's Liability Cases, 250 U. S. 400; 63 L. Ed. 1058.

Mountain Timber Co. vs. *State*, 243 U. S. 219; 61 L. Ed. 685.

Cudahy Packing Co. vs. *Parramore*, 263 U. S. 418; 68 L. Ed. 366.

It is limited in its application to cases involving the relationship of employer and employee, or master and servant. See:

Crowell vs. *Benson*, 285 U. S. 22; 76 L. Ed. 598.

The Compensation Act makes provision for certain rights of the employer in cases where the injury to an employee was caused by negligence of a third party. These provisions are found in Section 33 of the Act; and a casual reading of Section 33 discloses that such right or rights, as are acquired by the employer, are by way of assignment. The manifest purpose of this section is to give to the employer some right or opportunity of obtaining reimbursement, when he has been required to pay compensation because the injury occurred to the employee during the course of the employment, where the injury was occasioned by the negligence of a third party.

The Compensation Act did not create a new cause of action for negligence causing death.

Aetna Life Insurance Company vs. *Moses*, 287 U. S. 530, 77 L. Ed. 477.
Hunt vs. *Bank Line*, 35 Fed. (2nd) 136.
Moore vs. *Christensen S. S. Co.*, 53 Fed. (2nd) 299.
Zirpola vs. *Casselman*, 237 N. Y. 367, 143 N. E. 222.
U. S. Fidelity and Guaranty Company vs. *Graham and Norton Company*, 254 N. Y. 50, 171 N. E. 903.
Storrs vs. *Mech* (Md. 1934), 170 Atl. 743.

In the case of *Aetna Life Insurance Company* vs. *Moses, supra*, this Court, in dealing with the Compensation Act and the death by wrongful act statute in question here, rejected the idea that the compensation law created any new cause of action for negligence causing death. In its opinion this Court said:

"In the case where the employee survives and accepts compensation as the only person entitled, it is clear that the statutory assignment vests in the em-

> ployer the full right to recover damages from the third person. Double recovery by the employee * * * is thus avoided. * * *
>
> "In this case the injury resulted in the death of the employee and the election to take compensation was made by the widow. * * * Her election has called into operation the statutory assignment so far as it applies to the action for wrongful death. We must decide its effect on that cause of action."

In the case of *Hunt* vs. *Bank Line, supra,* the Circuit Court of Appeals for the Fourth Circuit, in a case under the Longshoremen's Act, held that upon acceptance of compensation an employee could not thereafter sue the third party whose negligence caused the injury, even though the employer refused to bring such a suit, as the entire right of action passed to the employer.

In the case of *Moore* vs. *Christensen S. S. Company, supra,* the Circuit Court of Appeals for the Fifth Circuit, in affirming a decision of the District Court denying the right of the administrator of a deceased longshoreman to sue the third party whose negligence allegedly caused the death, said:

> "It is not to be supposed that for the same injury or death two actions against the same party were contemplated, one under the state law and another under the Act of Congress."

In *Zirpola* vs. *Casselman, supra,* the New York Court, in construing the New York Workmen's Compensation Law, which incidentally was the model used in drafting the Longshoremen's Act, said:

> "The Compensation Act did not create a new cause of action against wrongdoers other than the employer with a new class of beneficiaries. It found a cause of action already in existence, and assuming that this cause of action would continue in the future, it fixed the extent to which the shares that belonged to the

dependents should be applied in reduction of the burdens that were placed upon the carrier."

In the very recent case of *Storrs* vs. *Mech, supra,* the Court of Appeals of Maryland, in deciding a case involving construction of the death statute and the provisions of the workmen's compensation law relative to actions where an employee is killed, said:

> "In other words, section 58 of Article 101 does not create any new liability, but simply designates in what manner the liability theretofore existing under the common law and Lord Campbell's Act, should be enforced, and changes the parties who might be benefited by such enforcement.
>
> * * * * * * * * *
>
> "There is nothing in conflict between the provisions of Article 67, 'Lord Campbell's Act', and Article 101 'Workmen's Compensation'. They both unquestionably deal with recovery for injuries resulting in death. The two statutes are in *pari materia* and must be construed together."

The opinion of the United States Court of Appeals in this case held that the most casual reading of the Act necessarily excluded any assumption that the third party would be subjected to separate and independent suits for the same cause of action. Indeed, it is not urged that the Compensation Act creates any new and separate cause of action against an alleged third party wrongdoer; and counsel for the respondent have been unable to find any case in which any Court has held that such a law created any such new cause of action. All of the authorities that have been found either expressly hold, or assume, that there is but one cause of action for negligence causing death.

Generally, a single wrongful or negligent act can give rise to but one cause of action in tort.

1 Ruling Case Law 344.
Baltimore Steamship Co. vs. *Phillips,* 274 U. S. 316; 71 L. Ed. 1069.

Brannenburg vs. *Indianapolis P. & C. R. Co.*, 13 Ind. 103; 74 Am. Dec. 250.
Wheeler Sav. Bank vs. *Tracey*, 141 Mo. 252; 42 S. W. 946; 64 A. S. R. 505.
Kansas City M. & O. R. Co. vs. *Shutt*, 24 Okla. 96; 104 Pac. 51; 20 Ann. Cas. 255.

Since there is, and can be, only one cause of action for negligence causing death, the sole question presented in this case is the question of who is the proper party to maintain the action.

The Right of Action Under the Death by Wrongful Act Statute Has Been Assigned to the Employer.

The question as to who is the proper party to maintain the action becomes one of statutory construction. The question of whether, under the facts of this case, the cause of action against the third party alleged wrongdoer has been assigned to the employer depends upon the construction of Section 33 of the Compensation Act.

It is perfectly clear from reading the provisions of Section 33 that when the employee is injured by reason of the alleged negligence of the third party, and the employee accepts compensation, the right of action is assigned to the employer. When the injury results in the death of the employee, the statute is not so clear, and may well be said to be ambiguous, particularly by reason of the use of the words "of the person entitled to compensation". However, by reading together the various sub-paragraphs, it is apparent that the Act contemplates the same result in a case where death results as in a case of injury without death to the employee, namely, that when the employer is required under the Compensation Act to pay compensation the right of action against the third party alleged wrongdoer shall be assigned to him.

Section 33 was involved in the case of *Aetna Life Insurance Company* vs. *Moses, supra*, and was construed by this

Court. In that opinion, and after discussing the various sub-paragraphs of Section 33, this Court said:

> "Having regard to these provisions and to the general purpose which the Act discloses with respect to rights of recovery when the injury does not result in death, we see no escape from the conclusion that the statute contemplates that the employer is to have the same control over the institution of an action for wrongful death, the compromise and settlement of the claim, and the distribution of the proceeds, as he is given in unambiguous language in the case where the injury results only in disability. What is made explicit by the statute with respect to the latter is implicit with respect to the former."

The provisions in Section 33 (c) for payment of any surplus recovered by the employer constitute the vital difference between this statute and the New York Statute, under which the New York cases relied upon by the petitioner arose. The New York statute contains no provision for payment of a surplus recovery by the employer to anyone.

The Circuit Court of Appeals for the 4th Circuit, in the case of *Hunt* vs. *Bank Line, supra,* points out this distinction, and states that while the statute seems to be modeled after the New York Statute the assignment clause differs; that in New York the employer keeps the balance, and the Federal Act doubtless sought to avoid this.

This Court, in the *Aetna* vs. *Moses* case, also recognized this distinction between the New York Statute and the Federal Act, stating on page 540 of the opinion:

> "For if it had been intended that the employer should assert only a part of the action for wrongful death, proportionate to the interest of those who are dependents under the Compensation Act, compare *Zirpola* v. *F. & E. Casselman,* 237 N. Y. 367, 143 N. E. 222; *United States Fidelity & G. Co.* v. *Graham & N. Co.,* 254 N. Y. 50, 171 N. E. 903, there would be no meaning to the language of sec. 33 (2) directing him to pay to

> the personal representative from the proceeds of the action any excess over the compensation award."

In the case of *Moore* vs. *Christensen S. S. Company, supra,* the Court further stated in its opinion that:

> "It clearly was the intent of Congress to assign to the employer all rights of the legal representative of the deceased, and also to enumerate the classes of the beneficiaries on whose behalf recovery might be had."

In this case we are concerned with a question of what person, or legal entity, is vested with the authority and right to maintain an action against the third party alleged wrongdoer for negligence causing death. The respondent in this case is not concerned with questions of equities between next of kin or dependents, or with distribution of the proceeds of a recovery. Those questions may be settled and determined by the parties claiming an interest therein, after the liability of the third party is determined. Obviously, the question of distribution of proceeds from recovery cannot arise unless the negligence question has been voluntarily settled or has been determined adversely to the third party and a judgment has been rendered against him.

The law, therefore, should be settled as to who is the proper person to institute and maintain such an action; or, otherwise, any third party, charged with negligence in connection with the death of an employee, would be unable to determine the person with whom he could, if he desired, settle or compromise the claim, nor would he know whose suit he might properly be called upon to defend.

The question of who is the proper person to maintain the action against the third party depends upon whether or not there was a valid election to accept compensation, which, under the terms of Section 33 of the Compensation Act, transferred the right of action to the employer.

In the light of the decision of this Court in the case of *Aetna Life Insurance Company* vs. *Moses, supra,* it is sub-

mitted that the decision of the United States Court of Appeals for the District of Columbia in this case, in which it was held that the employer, having paid compensation to the widow, is entitled to recover the amount paid, and that the right to recover part is the right to recover all, and further that where any beneficiary elects to take compensation the employer has the exclusive right to bring the action, is the correct and proper construction of the Compensation Act and is the correct and proper determination of the question as to who may maintain the action.

The petitioner, in his brief, goes into great length to discuss certain inequities and discrimination in the distribution of the proceeds of a successful suit that would result from the decision that has been rendered in this case.

It would seem that the petitioner complains that, by holding that the right of action is assigned to the employer, the method of distribution of the proceeds of the litigation is changed from that which is set out in the death by wrongful act statute, and that he is thereby being deprived of certain vested rights under the death by wrongful act statute. The Compensation Act was in force long before the happening of the accident which resulted in the death of the decedent; and the plaintiff had no vested interest of which he could be deprived.

The right of action for negligence causing death is not an asset of the estate of the decedent, recovery under any such action is not subject to the debts of the decedent, and the provisions of the statute, providing for distribution to next of kin, are merely a convenient method for distribution of damages and do not create any vested interest in any estate.

It is submitted there are no vested rights in the method of distribution of damages received under a death statute. There are no vested rights in existing law which preclude its change or repeal. See:

Louisville & N. R. Co. vs. *Mottley*, 219 U. S. 467; 55 L. Ed. 297.
Mondou vs. *New York, etc. Co.*, 223 U. S. 1; 56 L. Ed. 327.
Backus vs. *Fort St. Union Depot Co.*, 169 U. S. 559; 42 L. Ed. 853.
Middleton vs. *Texas Power, etc. Co.*, 249 U. S. 152; 63 L. Ed. 527.
Arizona Employers' Liability Cases, 250 U. S. 400; 63 L. Ed. 1058.

It would seem beyond argument that, since the right of action for negligence causing death is purely statutory, the Congress has the power to and may change the provisions of the death by wrongful act statute, and may set up a different method of distribution of the proceeds of such a suit, or may provide for a new class of beneficiaries. Dependents may properly be given a preference over next of kin. It may well be said that Congress has, by the enactment of the Compensation Act, changed the method of distribution under the death by wrongful act statute in any case in which the Compensation Act is also drawn into operation by proceedings thereunder. Such was the situation in the case of *Storrs* vs. *Mech*, *supra*, in which the Maryland Court of Appeals held that the Workmen's Compensation Law in Maryland had amended the Lord Campbell's Act whenever applicable by setting up a new class of beneficiaries.

The petitioner concedes that under the facts of the *Aetna* case, *supra*, the right of action was validly assigned to the employer. Does not this destroy most of his argument about the injustice of next of kin being barred, or their distributive share being diminished by reason of such assignment? In the Aetna case there might have been several next of kin, not dependents, who would have suffered all of the inequities and discrimination he sets forth, yet he concedes that there was a proper transfer; and it would therefore seem that the argument advanced cannot well be

maintained without questioning the soundness of the decision in that case.

It might be noted that the distribution of proceeds derived from suits under so-called Lord Campbell's Acts in the various states varies greatly. There is nothing particularly sacred or vested in the provisions of our statute directing distribution to next of kin, and our statute conceivably works inequities in that it makes no provision for varying degrees of dependency between next of kin. For example, a wealthy child secures the same distributive share as a crippled, dependent child.

Any number of supposititious cases may be presented which would show discrimination in favor of one class of beneficiaries over another. To the list presented by petitioner may be added another, which would illustrate the converse of the proposition urged by him, namely: Under the Statute of Distribution (Act of March 3, 1901; 31 Stat. 1250, c. 854, sec. 377; April 19, 1920, 41 Stat. 563, c. 153; D. C. Code, Title 29, Sections 285 and 286), where there is no surviving spouse and there are children of the decedent, the children take all of the personalty equally. Under the Compensation Act a child or children eighteen (18) years of age may not receive compensation. If there be, in such a case, a father, who is dependent, he may be entitled to compensation; but he would not share in the distribution under the Statute of Distribution. Should the father in such case claim and receive compensation; and the administrator be permitted to maintain the action under the death by wrongful act statute, and distribute in accordance with its terms; then the employer would be required to pay compensation, and would not be entitled to receive any reimbursement out of the proceeds of the suit under the death by wrongful act statute. This would follow because the person receiving compensation would have no interest in any amount recovered in such suit. Such a situation is obviously contrary to the purpose and intent of Section 33 of the Compensation Act.

Apart from all this, the place for the correction of inequities and discrimination resulting from statutory provisions, if any there be, is the Congress and not the Courts.

CONCLUSION.

In conclusion, therefore, it is respectfully submitted, first, that there is only one cause of action for negligence causing death in the District of Columbia; and, second, under the facts of this case this cause of action has been assigned to the employer under and by virtue of the terms of the Compensation Act. It follows that the decision of the United States Court of Appeals for the District of Columbia is the proper and correct determination of this controversy; and the petitioner is not entitled to maintain an action against the respondent.

WHEREFORE, it is respectfully submitted that the decision of the United States Court of Appeals in this case should be affirmed.

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